

Washington State Legislature
Public Records Task Force

Legislative Privilege and Related Principles

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Steven Huefner

*C. William O'Neill Professor of Law
and Judicial Administration,*
The Ohio State University Moritz College of Law

Separation of Powers/ Legislative Independence

Congress's Legislative Privilege:

“for any Speech or Debate in either House, [Members] shall not be questioned in any other Place.”

- U.S. Const., art. I, §6 (1789)

A Critical Protection of *the Public's* Interests

- Asserted by Parliament in establishing independence from Crown (1689).
- Fundamental to robust policy debate (Colonial Period to present);
- and to protecting the integrity of the legislative process.

“The freedom of deliberation, speech, and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever.”

- Massachusetts (1780)
- New Hampshire (1784)

Separation of Powers/ Legislative Independence

- Washington State Legislature:

“No member of the legislature shall be liable in any civil action or criminal prosecution whatever, for words spoken in debate.”

- Washington Const., art. II, §17 (1889)

How does it protect legislative independence?

- Promotes uninhibited deliberation.
- Reduces the burdens of litigation:
 - As defendant
 - As witness

Including (from its inception!) by privileging legislative documents.

But isn't it in tension with Open Government?

Like Judicial Privilege and Executive Privilege.

[Two other privileges also of constitutional dimension.]

Existence of privilege not same as nondisclosure.

- Privilege can be waived.
- Legislature can inquire, question, discipline, *internally*.

Statutory compulsion?

- At federal level, FOIA does not apply to Congress.
- Partly to avoid questions of waiver:

Where it applies, the privilege typically belongs to individual members, who alone may have the power to waive it.

Constituents (lobbyists) are NOT able to assert it.

For example, in litigation or court-ordered discovery situations, constituents often *are* required to turn over the same documents for which legislators have a privilege.

[But no help in public records request.]

What of Washington's constitutional text?

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What of Washington's constitutional text?

“words spoken in debate”

“liable” = ?

Other states: “liable to answer...”

Robust interpretation: legislature not subject to judicial oversight/control.

Washington Farm Bureau

- Lower court recognized applicability of Washington's legislative privilege to internal legislative documents and to materials solicited for a legislative purpose.
- Washington Supreme Court did not reach the issue.

In conclusion:

At issue is a question of process, with real public interests on both sides:

- Transparency.
- Uninhibited debate, free from fear of legal (as opposed to political) reprisals and resentments.